No. 84-1869

Supreme Court, U.S.
FILED
AUG 19 1985
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1984

FRANK J. MARCONE,

Petitioner,

vs.

PENTHOUSE INTERNATIONAL, LTD.,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

STEPHEN M. FELDMAN
Counsel of Record
GARY LEE
STEPHEN M. FELDMAN, P.C.
Attorneys for Petitioner
1715 Rittenhouse Square
Philadelphia, Pennsylvania 19103
(215) 546-2604

BEST AVAILABLE COPY

2226
Ista Appellate Printers, Inc. • NJ (201) 257-6850 • NY (212) 840-9494 • PA (215) 563-5587 MA (617) 542-1114 • DC (202) 783-7288 • USA (800) 5 APPEAL

TABLE OF CONTENTS

Page

I. Contrary to respondent's argument, petitioner has not waived any issues which he has presented. 1

II. Contrary to respondent's argument, the question of which party has the burden of proving public figure status has not been settled; and the Court of Appeals erroneously placed the burden of proving public figure status upon the petitioner. 4

III. Contrary to respondent's argument, the Court of Appeals relied upon hearsay in holding that petitioner was a public figure. 5

IV. Contrary to respondent's argument, petitioner has a right to a jury trial on subsidiary issues of fact relating to the ultimate legal issue of public figure status. 6

V. Contrary to respondent's argument, the Court of Appeals did not define the public controversy as the legalization of marijuana and the article had nothing to do with the legalization of marijuana. 7

Conclusion 8

TABLE OF CITATIONS

Cases Cited:

Bayless v. Phila. National League Club, 579 F. 2d 37 (3rd Cir. 1978) 6

Contents

Page

Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974) 5

Hutchinson v. Proxmire, 443 U.S. 111, 99 S. Ct. 2675, 61, L. Ed. 2d 411 (1979) 5

O'Brien v. Eli Lilly Co., 668 F. 2d 704 (3d Cir. 1981) 6

Time, Inc. v. Firestone, 424 U.S. 448, 96 S. Ct. 958, 47 L. Ed. 2d 154 (1976) 5

Wolston v. Reader's Digest Ass'n. Inc., 443 U.S. 157, 99 S. Ct. 2701, 61 L. Ed. 2d 450 (1979) 5, 7

Other Authorities Cited:

Prosser & Keeton on Torts, p. 806 (1984) 4

Restatement, Torts 2d § 580A (1977)..... 4

No. 84-1869

In The

Supreme Court of the United States

October Term, 1984

FRANK J. MARCONE,

Petitioner,

vs.

PENTHOUSE INTERNATIONAL, LTD.,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

I.

Contrary to respondent's argument, petitioner has not waived any issues which he has presented.

Respondent contends that petitioner has waived his hearsay, burden of proof and jury trial arguments. However, respondent's contention is totally without merit because the first time any of these issues arose in this case was in the Court of Appeals' opinion.

To support its argument as to waiver, respondent states that:

> In opposing Penthouse's motion for sumamry judgment before the District Court, Marcone never objected to the use of newspaper articles on the ground of hearsay (Resp. Br. 2)

This fact, however, has no bearing whatsoever on the issue of waiver because in offering the newspaper articles in support of its summary judgment motion, respondent expressly limited the articles' use to non-hearsay, stating:

> The newspaper articles presented to the Court on the summary judgment motion *are not offered to prove the truth of their contents,* but to demonstrate that Mr. Marcone has undeniably attracted a great deal of media attention. . . (Deft's. Reply Memo. in Sup. of Its Summary Judgment Motion, p. 10, D.C. Record, Item 24). (Emphasis added).

Thus, petitioner had no basis for a hearsay objection.

Respondent also argues that petitioner failed to complain about hearsay in the Court of Appeals. However, again, the respondent ignores the fact that hearsay was not an issue until the Court of Appeals rendered its opinion. At trial, the newspaper articles were admitted into evidence solely for the purpose of mitigating damages by attempting to show petitioner's pre-publication reputation and not for the truth of the matters asserted therein (N.T.4.77, Charge of the Court, 47).[1] Indeed, respondent

1. It is ironic that respondent has argued that petitioner has waived the right to complain about hearsay. Before this Court, respondent argues for the first time that the news articles were admissible on the issue of public figure status; at trial, however, they were offered and admitted solely for the purpose of mitigating damages by showing petitioner's pre-publication reputation.

expressly disclaimed any hearsay purpose in offering the news articles into evidence, by stating:

> Penthouse does not seek to introduce these news media articles into evidence for the *truth* of the statements contained therein (Penthouse's Trial Memo. of Law Supporting the Use of News Media Articles p. 3, D.C. Record, Item 29). (Emphasis in original).

As in the district court, respondent, in the Court of Appeals, did not rely on the newpaper articles for the truth of the matters contained therein. And respondent has maintained the same position in this Court[2] (Resp. Br. 5). Thus, there was no basis for petitioner to complain about hearsay at trial or in the Court of Appeals, and his failure to do so cannot constitute waiver.

Respondent also argues that petitioner waived the issues of burden of proof and right to jury trial by not raising those issues in the Court of Appeals. In fact, petitioner had no occasion to raise those issues until after the Court of Appeals decision. The district court had resolved the issue of public figure status in his favor and had not placed the burden of proof upon him and had not denied him his right to jury trial. In the Court of Appeals, respondent did not argue that the burden of proving public figure status was on petitioner and did not argue that there was any issue of fact regarding petitioner's status as a public figure. Thus, there was no basis for petitioner to raise these arguments in the district court or Court of Appeals.[3]

---

2. As is pointed out in Footnote 4 below, notwithstanding respondent's concession, the Court of Appeals relied heavily on the truth of the articles in finding petitioner to be a public figure.

3. Respondent makes the misleading statement that the district court "invited Penthouse to more fully develop the factual record at trial regarding

(Cont'd)

II.

Contrary to respondent's argument, the question of which party has the burden of proving public figure status has not been settled; and the Court of Appeals erroneously placed the burden of proving public figure status upon the petitioner.

In a vain attempt to avoid the issue, respondent agrees that the burden of proving public figure status is on a libel defendant. However, as petitioner has set forth in his petition, prominent commentators have stated that the burden of proof issue is an open question. *Restatement*, Torts 2d § 580A (1977); *Prosser & Keeton* on Torts, p. 806 (1984).

Moreover, contrary to respondent's argument, as the petition demonstrates, the Court of Appeals did place the burden of proving public figure status upon the petitioner. Respondent's characterization of petitioner's argument as simply being based upon petitioner's "interpretation" of the evidence is incorrect. Rather, it is based upon a plain reading of the Court of Appeals' opinion. Aside from making the conclusory statement that the

---

(Cont'd)

the public figure issue" (Resp. Br. 2). Statements by respondent, the district court and the Court of Appeals contradict this. Petitioner's status as a public figure was not an issue *at trial*. Respondent's counsel, in his oral argument to the trial judge in support of his motion for a directed verdict at the close of all of petitioner's evidence stated "this Court has ruled that the plaintiff in this case is a private figure . . ." (N.T. 6.190). On the resjpondent's motion for summary judgment the district court determined that "Mr. Marcone is not a public figure for the limited purposes of this action" (533 F. Supp. at 360, App. 65-66). Respondent did not even argue the issue of whether petitioner was a public figure in its memorandum of law in support of its motion for judgment notwithstanding the verdict, or in the alternative for new trial (Item 64, U.S.D.C. record). On post-trial motions, the issue of petitioner's status as a public figure was, likewise, treated as having been determined by the summary judgment motion (517 F. Supp. at 322, App. 75). The Third Circuit also treated the issue as foreclosed prior to trial (754 F. 2d at 1077, App. 6).

Court of Appeals placed the burden of proof on the respondent, respondent fails to point out any language in the Court of Appeals' opinion which supports this argument.

III.

Contrary to respondent's argument, the Court of Appeals relied upon hearsay in holding that petitioner was a public figure.

Respondent erroneously asserts that petitioner has misread the Court of Appeals' opinion, and that the Court of Appeals did not rely upon newspaper articles for the truth of the matters asserted therein (Resp. Br. 4). The Court of Appeals' opinion refutes this,[4] as does another section of respondent's brief (Resp. Br. 7, ¶1).

Respondent also incorrectly argues that this Court's decision in *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157, 99 S. Ct. 2701, 61 L. Ed. 2d 450 (1979), approves the use of media reports to establish public figure status. The petition explains in detail that this Court has always considered whether plaintiff was in fact a public figure rather than whether he or she was merely reputed to be a public figure [Pet. 10-11, citing *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157, 99 S. Ct. 2701, 61 L. Ed. 2d 450 (1979); *Hutchinson v. Proxmire*, 443 U.S. 111, 99 S. Ct. 2675, 61 L. Ed. 2d 411 (1979); *Time, Inc. v. Firestone*, 424 U.S. 448, 96 S. Ct. 958, 47 L. Ed. 2d 154 (1976); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974)].

4. The Court of Appeals stated: "Marcone *reportedly* met at the Pagans' headquarters [the Castle] with Frey, Heron and Mealy. In addition, one *newspaper article reported* that Marcone admitted to going on occasional weekend trips with motorcycle gang members. For purposes of public figure analysis, we must look to Marcone's *actions* in addition to his intentions. . . . We find that Marcone's *voluntary connection* with motorcycle gangs — including his meetings at the Castle with Frey and his occasional weekend trips with them — in conjunction with the intense media attention he engendered is sufficient to render Marcone a public figure" . . .(App. 25-26). (Emphasis added.)

IV.

Contrary to respondent's argument, petitioner has a right to a jury trial on subsidiary issues of fact relating to the ultimate legal issue of public figure status.

Respondent's argument that there is no right to a jury trial on disputed subsidiary issues of fact relating to plaintiff's status as a public figure is based upon misstatements of fact and law.[5] Repsondent analogizes public figure status to the statute of limitations defense (Resp. Br. 5). According to respondent, the court, not the jury, decides disputed facts in determining the defense of the statute of limitations. This argument is legally incorrect. *O'Brien v. Eli Lilly Co.*, 668 F. 2d 704, 709 (3d Cir. 1981); *Bayles v. Phila. National League Club*, 579 F. 2d 37 (3rd Cir. 1978). The analogy to service of process is inapt because service of process, unlike the constitutional privilege in the instant case, is not a defense to a cause of action.

Respondent also argues that "the issue of fact, if any, was not the truth of petitioner's various activities . . . but the existence of numerous newspaper articles" (Resp. Br. 5). This statement, which is not supported by citation to any authority, is nothing more than respondent's view of the law. As the petition indicates, this Court has not, but should, settle the question of whether plaintiff's status as a public figure can be established by mere hearsay, such as newspaper articles. Moreover, respondent has demonstrated the fallacy of its own argument by quoting portions of the Court of Appeals' opinion in which the court relied upon the newspaper articles for the truth of the matters asserted therein, and not for the mere existence of the articles (Resp. Br. 7, ¶1).

---

5. Petitioner has agreed that the ultimate question of whether a person is a public figure is a legal issue to be decided by the court.

Further, respondent erroneously argues that "there is nothing in the record to suggest that the Court of Appeals relied upon any material issue of disputed fact in order to arrive at its conclusion that Marcone was a limited purpose public figure" (Resp. Br. 6). This statement is untrue. The petition establishes otherwise (Pet. 11). As stated in the petition, the Court of Appeals considered as fact that petitioner had met various people at the Castle (757 F. 2d at 1086-87, App. 25-27). Petitioner, however, expressly denied having any connection with the Castle (N.T. 4.66). Petitioner could have rebutted other assertions in the newspaper articles, but had no reason to do so because his status as a public figure was not an issue at trial (*See* Footnote 2, *supra*).

V.

Contrary to respondent's argument, the Court of Appeals did not define the public controversy as the legalization of marijuana and the article had nothing to do with the legalization of marijuana.

The petition explains in detail how the Court of Appeals defined public controversy in direct conflict with this Court's decision in *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157, 166 n.8, 99 S. Ct. 2701, 2707 n.8, 61 L. Ed. 2d 450 (1979) (Pet. 13-15). In an effort to support the Court of Appeals' opinion, respondent mischaracterizes the pubic controversy as "legalization of marijuana" (Resp. Br. 7). The Court of Appeals, however, did not hold that the public controversy was the legalization of marijuana. This is not surprising because the article had nothing to do with the legalization of marijuana; it was about the details of the sale and distribution of marijuana.